No. 18782

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RUBEN R. CORTEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

This is an appeal from the judgment of the United States District Court for the Southern District of California, denying appellant's motion to vacate the judgment, sentence, and commitment in Case No. 30337 Criminal, Southern Division of the Southern District of California.

The District Court had jurisdiction by virtue of Title 28, United States Code, Section 2255. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1294 and 2255.

II.

STATEMENT OF THE CASE.

On August 30, 1961, the Federal Grand Jury in the Southern Division of the Southern District of California returned a two-count Indictment against Aurora

Cortez, appellant Ruben Raymond Cortez, and Roger Cortez. Aurora Cortez was charged in Count One with the illegal importation of heroin under Title 21, Section 174, United States Code, and appellant and Roger Cortez were charged in the same count, under the same statute, with aiding, assisting, abetting, counselling, commanding, inducing, and procuring the above-mentioned offense by Aurora Cortez.

Appellant alone was charged in Count Two of the Indictment with forcibly resisting, opposing, impeding, and interfering with United States officers in the performance of their official duties, in violation of Title 18, United States Code, Section 111 [C. T. 2-3].[1]

Appellant entered a plea of not guilty as to each count on September 18, 1961 [C. T. 4], and entered a guilty plea as to each count on October 17, 1961 [R. T. 35-36].[2]

Thereafter, on November 14, 1961, appellant was committed to the custody of the Attorney General for one year upon Count Two and six years upon Count One, the latter sentence to run consecutive to the former [C. T. 5].

On July 23, 1962, appellant wrote a letter which the District Court considered as a petition for relief under Title 28, United States Code, Section 2255 [C. T. 8]. Appellant alleged that his guilty plea was not the product of free choice and that he was innocent [C. T. 9].

The hearing upon the motion was conducted on December 3, 1962 [C. T. 10]. The motion was denied on April 11, 1963 [C. T. 19]. Appellant thereafter filed a notice of appeal [C. T. 24].

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[1]"C. T." refers to the Clerk's Transcript of Record.
[2]"R. T." refers to Reporter's Transcript of Proceedings.

III.
ERROR SPECIFIED.

Appellant originally specified two points on appeal:

1. That the trial court committed error prior to the Section 2255 hearing by allegedly holding two *ex parte* hearings without appellant's presence.

2. That the trial court violated appellant's constitutional rights by remanding him to confinement without signing an order showing that findings of fact and conclusions of law had been made with respect to the relief sought under Section 2255 [C. T. 24-25].

Appellant's Opening Brief does not mention the above contentions and lists two questions upon appeal, which may be summarized as follows:

1. Was the plea of guilty voluntary? (assuming certain disputed facts).

2. Was the plea of guilty coerced as a matter of law?

IV.
STATEMENT OF THE FACTS.

Appellant, charged in a two-count Indictment with aiding and abetting, etc., the smuggling of heroin by Aurora Cortez, and with resisting, opposing, etc., Federal officers [C. T. 2-3], entered a plea of not guilty as to each count on September 18, 1961 [C. T. 4]. Aurora Cortez, also charged in Count One, was appellant's wife [R. T. 10].

Appellant was out on bail awaiting trial [R. T. 12]. His appointed attorney, Howard Wiggins talked to him two or three times before the day of trial [R. T. 43-44] and also talked to a witness, Helena Willcut [R. T. 49]. Appellant also talked to an attorney of his own

choice, Mr. Hughes, on two or three occasions and received advice from him [R. T. 16].

Appellant told Mr. Wiggins that he was innocent but told him conflicting stories [R. T. 46]. Appellant's wife, Aurora Cortez, withheld one of the essential facts of the case from Mr. Wiggins in appellant's presence [R. T. 48]. Mr. Wiggins told appellant that he had talked to Helena Willcut and found her testimony "very damaging" on the narcotics charge [R. T. 49], that she said that he had seemed "extremely nervous" and "very concerned with the traffic that would be coming back from the border" [R. T. 50].

Mr. Wiggins also informed appellant that the Government had witnesses who would testify regarding sales of narcotics by appellant to school children or upon school grounds in the Oxnard-Ventura area [R. T. 51-52].

He informed appellant that he probably would be found guilty upon circumstantial evidence and "emphasized to him that we would have difficulty trying to get the jury to believe testimony put forward by both him and his wife for the reason that she had been convicted of perjury and he of a felony" [R. T. 53].

Attorney Wiggins warned appellant of the possible consequences if he went to trial and committed perjury [R. T. 67].

Mr. Wiggins telephoned an Assistant United States Attorney to suggest a disposition of the case [R. T. 54]. There was some discussion about a guilty plea by appellant to the offenses charged and by Aurora Cortez to a heroin tax offense [R. T. 55].

Mr. Wiggins told appellant that the trial judge would be Judge Mathes and that he had heard that Judge

Mathes was extremely tough on narcotics cases but that there was a possibility of having a different sentencing judge in the event of a guilty plea [R. T. 64].

On the morning of the trial date appellant told Mr. Wiggins that he had decided to plead guilty and that his wife would plead guilty under the tax statute [R. T. 56]. Mr. Wiggins told him that he was already to go to trial. There was a jury present in the courtroom that morning [C. T. 57].

Appellant entered a plea of guilty as to each count [R. T. 35-36]. He stated in court that that was his desire [C. T. 20]. The following conversation occurred:

> "The Court: Do you understand the offenses charged against you in Counts One and Two of the Indictment?
>
> Defendant Ruben Raymond Cortez: Yes, sir.
>
> The Court: Do you offer this plea of guilty *freely and voluntarily* and entirely of your own accord as to both offenses?
>
> Defendant Ruben Raymond Cortez: Yes, sir.
>
> The Court: *Are you entirely sure you wish to confess the crimes* charged against you in Counts One and Two of the Indictment by pleading guilty to each of them?
>
> Defendant Ruben Raymond Cortez: Yes.
>
> The Court: *Are you guilty of those crimes?*
>
> Defendant Ruben Raymond Cortez: Yes, sir" [C. T. 21]. (Emphasis added).

The court then questioned Mr. Wiggins, who stated that in his opinion the pleas of guilty were *voluntarily* and understandingly offered [C. T. 21].

There was additional conversation between the court and appellant:

> "The Court: Ruben Raymond Cortez, has any promse of reward or any inducement of any kind been offered to you?
>
> Defendant Ruben Raymond Cortez: No, sir.
>
> The Court: To persuade you to change your plea?
>
> Defendant Ruben Raymond Cortez: No.
>
> The Court: Has there been any promise of any leniency in punishment?
>
> Defendant Ruben Raymond Cortez: No. . . .
>
> The Court: . . . Has there been any suggestion your wife would receive a lighter sentence if you pleaded guilty?
>
> Defendant Ruben Raymond Cortez: No, sir." [C. T. 22].

Mr. Wiggins talked to appellant three or four times afterwards, prior to sentence [R. T. 44].

At the time for sentence, November 14, 1961, appellant told Judge Carter, in effect, that he, appellant, was guilty of getting his wife into the predicament [R. T. 26], that he had "engineered the deal" with his wife and brother [R. T. 24-25].

Appellant indicated that he falsely admitted guilt because he was supposed to answer in the affirmative when asked by the judge whether he was guilty [R. T. 23]. However, he also answered in the affirmative when asked whether he had engineered the deal and used his brother and wife [R. T. 23], although he had not anticipated that question [R. T. 24].

At that time appellant knew that there were witnesses present, ready to testify against him [R. T. 36-37].

There was not at any time any direct contact between appellant and the United States Attorney's office [R. T. 71].

Aurora Cortez did plead guilty to a tax count charge, involving a minimum sentence of two years[3] and a maximum of twenty years. Her original charge involved a minimum sentence of five years with no probation, and a maximum of twenty [R. T. 80]. She was sentenced to two years in prison [R. T. 73].

Appellant testified [R. T. 15] that Attorney Wiggins told him that his wife "would get out on probation or something like that" if he pleaded guilty. Mr. Wiggins testified [R. T. 58] that he did not at any time tell appellant that his wife would go free if he pleaded guilty [R. T. 58].

Appellant testified that "at no time, to my knowledge, did Mr. Wiggins indicate that he believed or wanted to help me," and when asked whether Mr. Wiggins left the decision as to trial or plea up to him, he replied in the negative [R. T. 33]. Mr. Wiggins testified [R. T. 57] that he told appellant that appellant was to make the decision as to trial or plea and that "I told him I was ready to go to trial and that if we went to trial I would attempt to defend him as well as I possibly could."

Appellant testified [R. T. 42] that he told his attorney that he was swimming with his witnesses on the occasion in question. Mr. Wiggins testified [R. T. 50] that one of the witnesses, Helena Willcut, told him that appellant refused to go swimming on the occasion in question and was very concerned with the border traffic.

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[3]Unless, of course, probation was granted.

V.

ARGUMENT.

A. The Trial Court Did Not Err in Holding That Appellant's Pleas of Guilty Were Voluntarily Made.

The trial court held that appellant's pleas of guilty were voluntarily made [C. T. 5].

This is equivalent to a finding that appellant had failed to satisfy the burden of proof. The burden of proof rests upon a petitioner in a proceeding under Title 28, United States Code, Section 2255.

> *Holmes v. United States,* 323 F. 2d 430, at 431 (7th Cir. 1963), cert. denied, 376 U. S. 933 (1964);
>
> *Twining v. United States,* 321 F. 2d 432, at 435 (5th Cir. 1963), cert. denied, 376 U. S. 965 (1964);
>
> *Hearn v. United States,* 194 F. 2d 647, at 649 (7th Cir. 1952).

In such a proceeding, "Findings of fact cannot be set aside by an appellate court unless *clearly erroneous.* This rule applies likewise to all reasonable inferences of the trial judge."

> *Hearn v. United States, supra,* 194 F. 2d 647, at 649. (Emphasis added).

> "The issues of fact raised by the motion to vacate the judgment and sentence and to withdraw the plea of guilty were for the trial court to resolve, and its decision may not be overturned on appeal unless it is clearly erroneous and constitutes an abuse of discretion."
>
> *Harris v. United States,* 216 F. 2d 953 (5th Cir. 1954).

This is simply an application of the universal rule. The trier of fact has an opportunity to observe the demeanor of witnesses, the pauses in their testimony, and their changing expressions. A policy permitting the overthrow of findings of fact that are sustained by the evidence would tend to burden the appellate courts with countless appeals in which the only issues would involve credibility of witnesses, as determined from the cold record.

When a motion to vacate judgment is made under Section 2255 upon the ground, among others, that a plea of guilty was involuntary, "a finding by the court on this issue is 'then entitled to the same right and respect on appeal as is any other facts determination, which it is the court's duty to make.' "

> *Kennedy v. United States,* 249 F. 2d 257, at 258 (5th Cir. 1957).

The record fully sustains the conclusion that appellant failed to meet his burden of proof. He conferred with two attorneys before changing his pleas to guilty [R. T. 16, 43]. He talked to an attorney of his own choice, Mr. Hughes, upon two or three occasions [R. T. 16]. When he changed his pleas he told Judge Mathes that he was offering the guilty pleas freely and voluntarily [R. T. 21]. He was then asked if he wished to confess the crimes by pleading guilty and he answered, "Yes." He was then asked if he was guilty of the crimes and answered, "Yes, sir." [C. T. 21].

His attorney informed the court that in his opinion the pleas of guilty were *voluntarily* and understandingly offered [C. T. 21]. Appellant told the court that he had received no promises [C. T. 22].

Subsequently, and prior to sentence, appellant's attorney talked to him three or four times [R. T. 44].

Later, at the time for sentence, appellant, obviously referring to the heroin-smuggling charge, told Judge Carter that he had "engineered the deal" with his wife and brother [R. T. 24-25].

There was no direct contact between appellant and the United States Attorney's office [R. T. 71].

Appellant claimed that he had made false statements at the time of plea and the later sentencing date because he was instructed to do so [R. T. 23]. However, in considering the probability of truthfulness in this claim, the trial judge could consider the strong motive that appellant now has to falsify, as well as the fact that appellant admitted "engineering" the crime and using his brother and wife, although he had received no instructions in regard to answering that unanticipated question [R. T. 23-24].

The trial court also could consider the improbability that an innocent man would volunteer for a minimum sentence of five years merely to reduce his wife's sentence from a certain five years or more to a possibility of ten years.

The trial court also could examine appellant's testimony in the light of the contradictions between his testimony and (1) his statements to Judge Mathes, (2) his statement at the time of sentencing, (3) his attorney's testimony that he did not tell appellant that his wife would go free [R. T. 15, 58], (4) his attorney's testimony that he told appellant that it was appellant's decision as to whether to plead guilty [R. T. 33, 57], and (5) his attorney's testimony that he told appellant

that he would attempt to defend him as well as he could [R. T. 33, 57].

In determining the weight to be accorded to the various factors that may have influenced appellant's decision to plead guilty, the trial court could consider the probability that appellant had little motive to go to trial after learning that the testimony of his own proposed witness, Helena Willcut, was "very damaging" on the narcotics charge [R. T. 49], that the Government had witnesses who would testify regarding sales of narcotics by appellant to school children or upon school grounds [R. T. 51-52], and that his attorney believed that he would probably be found guilty and emphasized that they would have difficulty trying to get the jury to believe his testimony and that of his wife, as he had been convicted of a felony and she had been convicted of perjury [R. T. 53].

Appellant also may have considered the possible problems involved if he committed perjury at trial, a subject mentioned in one of his attorney's conversations with him [R. T. 67]. There also was testimony concerning the possibility of having a different sentencing judge if he pleaded guilty [R. T. 64]. A change of plea is not involuntary merely because based upon the hope of obtaining a lighter sentence.

> *Alexander v. United States,* 290 F. 2d 252 (5th Cir. 1961), cert. denied, 368 U. S. 891 (1961).

Also see:

> *Jones v. United States,* 279 F. 2d 652 at 654 (9th Cir. 1960), cert. denied, 364 U. S. 875 (1960).

Many factors may have entered into appellant's change of plea. It was for the trier of fact to deter-

mine whether promises constituted a dominating factor sufficient to render the plea involuntary. Appellant's claim is based almost entirely upon his own testimony. This was a slender reed after appellant had entered a plea of innocence, subsequently changed his plea to guilty and admitted guilt, later told the probation officer that he was innocent [R. T. 39], subsequently told the sentencing judge that he was guilty,[4] and over eight months later [C. T. 8] claimed innocence again. It is hardly surprising that the trial judge found that appellant failed to meet his burden of proof.

The decision of the trial court was entirely consistent with this Court's holding in *Booth v. United States,* 251 F. 2d 296 (9th Cir. 1958), in which the appellant contended that his guilty plea was invalid because based upon the prosecutor's statement that he would recommend that the sentence run concurrently with a State court sentence. This Court summarily disposed appellant's contention. (At p. 297.)

In view of the thorough examination of appellant at the time he entered pleas of guilty and again at the time of sentence, his case is similar to the facts of *Peters v. United States,* 312 F. 2d 481 (8th Cir. 1963), in which the trial court and appellate court rejected the defendant's contention that his guilty plea was involuntary because he was promised that his sentence would not exceed three years.

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[4]Knowing that if he persisted in his claim to the probation officer, contrary evidence was available [R. T. 36-37].

In *Bone v. United States,* 277 F. 2d 63 (8th Cir. 1960), the defendant asserted that his guilty plea resulted from false promises by a Postal Inspector and an Assistant United States Attorney. The appellate court noted that if there were any promises, they were fulfilled, and also that the transcript of the sentencing proceedings, in which the defendant admitted guilt and mentioned no promises, demonstrated the weakness of his position. In *Bone,* unlike the instant case, the defendant was *not even granted a hearing* in the trial court. His appeal was dismissed (at p. 65) as "frivolous."

In *Swepston v. United States,* 289 F. 2d 166 (8th Cir. 1961), cert. denied, 369 U. S. 812 (1962), the defendant compiled a number of allegations, including the claim that his guilty plea had been coerced. His motion under Section 2255 was denied without a hearing. The opinion of the appellate court states: "His present belated allegations denying the truth of that which he had theretofore admitted in open court are mere conclusions, void of factual support and do not justify the granting of a hearing" (at p. 170).

Another case in which the denial of a hearing upon a Section 2255 motion was upheld upon appeal was *Olive v. United States,* 327 F. 2d 646 (6th Cir. 1964), in which the defendant asserted that his plea was involuntary because induced by his attorney's statement that the United States Attorney had entered into an agreement regarding sentence. The appellate opinion attaches great weight to the defendant's statements at the time of plea and at the time of sentence.

A hearing also was denied in *United States v. Orlando,* 327 F. 2d 185 (6th Cir. 1964), in which the defendant claimed, among other things, that his guilty pleas were induced by a guarantee by the United States Attorney that he would not receive over 15 years. His first Section 2255 motion was denied without a hearing and there was no appeal, and his second motion, based entirely upon the alleged promise, was denied without a hearing because containing one of the grounds of the first motion. The appellate court agreed with this holding but alternatively held that no hearing would have been required and also noted (at p. 189):

> "When the guilty plea was entered the appellant expressly acknowledged to the Court that it was voluntary and entered because he was guilty of the charge."

A hearing also was denied in *United States v. Davis,* 319 F. 2d 482 (6th Cir. 1963), in which the defendant alleged that he was coerced and tricked into pleading guilty by a Postal Inspector's threats and promises. In affirming the order of the trial judge, the Sixth Circuit based its opinion almost entirely upon the statements made at the time of arraignment.

The above-cited decisions in *Bone, Swepston, Olive, Orlando,* and *Davis, supra,* are not cited to support a proposition that hearings are not required (a close question under the present status of the law). Appellant had a hearing. However, these decisions illustrate the great importance attached by trial and appellate

courts to statements made by defendants in open court. Considering the vital weight accorded to statements similar to those made by appellant before Judge Mathes and Judge Carter, it is completely unreasonable for appellant to contend that the trial court, in considering the record of appellant's statements in open court, and making its determination as to credibility of witnesses, arrived at a conclusion that was *"clearly erroneous."*

It also should be noted that there is some question as to the type of "promises" that may affect the voluntariness of a guilty plea. In *Tabor v. United States,* 203 F. 2d 948 (4th Cir. 1953), where a guilty plea was "in consideration of the remaining count being dismissed," the Fourth Circuit held that there were no promises (at p. 948).

One of the chief props in appellant's argument is based upon his statement about a "deal," mentioned at the time of sentence. This is repeatedly emphasized in Appellant's Opening Brief, at pages 8, 12, 13, and 14. Appellant overlooks the fact that the "deal" mentioned at the time of sentence [R. T. 23-26] was not a "deal" in regard to sentence or plea. *The "deal" was the scheme for smuggling heroin into the United States.* That is why appellant's attorney employed leading questions for the apparent purpose of obtaining a repudiation of the "deal" statement [R. T. 24-25] and that is why appellant was said to have *used* his brother and wife in the "deal." [R. T. 23].

VI.

CONCLUSION.

Since the decision of the trial court is fully supported by the evidence, even without reliance upon the general rule that the appellate court will only consider the evidence favorable to the prevailing party, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PHILLIP W. JOHNSON